Australian Competition & Consumer Commission	**Australian Logistics Council Forum 2010** ***How competition law supports transport and logistics solutions*** **Graeme Samuel** **Chairman** **3 March 2010, Sydney**

Introduction

Thank you for the invitation to be with you.

I'd like to first acknowledge the good work of the Australian Logistics Council in identifying blockages in Australia's transport supply chains and looking for long-term solutions to address these blockages.

Undoubtedly, the ACCC and the industry share some common goals – the ACCC is mandated with enhancing the welfare of Australians through the promotion of vigorous but fair competition and to that end, we want to see efficient transport supply chains and the removal of any blockages.

Today I'll address some misconceptions that may exist about how competition law works and allay any fears that such laws act as constraints when developing solutions to supply chain efficiency problems.

I'll also discuss what measures the ACCC has in place to remove other blockages in supply chains and instances where we have authorised anti-competitive arrangements on the basis that the net public benefit outweighs any detriment caused.

A key example is the Hunter Valley authorisation which I'll examine in some detail, shortly.

Competition law in action

Work undertaken by the National Transport Commission has identified measures that could improve the operation and performance of Australia's national freight supply chains, focusing on greater coordination and improved information sharing arrangements between supply chain participants.

Yet, there is some concern that such activities may breach the Trade Practices Act.

I understand COAG is due to consider a National Ports Strategy this year. I'm sure we'll find out more as the year continues.

What I can make clear is that the ACCC is willing and able to facilitate industry cooperation to come up with effective solutions to supply chain blockages.

However, in doing so, our fundamental goal will be to ensure that the solutions that are proposed are consistent with the Trade Practices Act.

If parties are interested in coming together to discuss possible solutions, it's a good idea to have an experienced trade practices lawyer on hand to advise with setting the ground rules for such discussions.

There are serious consequences for breaching the Act, especially those companies and employees found to have engaged in cartel conduct.

From July 24 last year, a criminal cartel offence was introduced, alongside the existing civil prohibition, providing substantial penalties including imprisonment for cartelists.

If potential for a breach exists, but the parties consider there are offsetting public benefits, then you should come and talk to the ACCC, to determine whether the authorisation or notification process may be appropriate. This will provide immunity from legal action for the anti-competitive conduct.

For example, in matters previously considered by the ACCC, parties have claimed that greater supply chain coordination provides offsetting efficiency benefits.

The ACCC can then conduct a public consultation, inviting submissions from a range of interested parties about the proposed arrangements.

The ACCC then issues a draft decision and invites further submissions before issuing its final decision within six months.

It's also worth considering whether, before embarking on an authorisation application, there is some governance arrangement available – such as an independent capacity coordinator – that would deal with concerns about lessening competition but still deliver the desired benefits.

In any case, I cannot stress enough the importance of speaking to the ACCC at an early stage.

Let the recent settlement of court action against Australian Amalgamated Terminals (AAT) be a 'warning' to the industry – companies that give effect to cooperative agreements without such authorisation under Part VII of the Act face the very real risk of such agreements being deemed anti-competitive and substantial penalties may follow.

It is not the ACCC's role to come up with solutions to fix supply chain problems.

Instead the ACCC will always be available to examine whether those solutions driven by industry are appropriate under the Act.

In the ACCC's experience, a cooperative arrangement is more likely to fully address supply chain coordination problems if it involves all key service providers in the chain.

Hunter Valley coal chain authorisation

A good case in point is the Hunter Valley coal chain, where the ACCC has had a role in both authorising the agreements arrived at by the port operators, and ruling on access arrangements proposed by the track operator.

It is an excellent example of a system where the ACCC has worked with industry to facilitate a more effective end-to-end supply chain; and minimise losses through capacity constraints and ship queues.

In the Hunter Valley, multiple parties are involved in facilitating a joint solution up and down the chain, from coal mine to ship.

This includes coal producers, port operators, the Australian Rail Track Corporation, the above-rail operators and the Hunter Valley Coal Chain Coordinator.

The ACCC has been involved both in authorising long-term agreements between the parties for effective logistical management of the chain, and in assessing the terms of access to the rail track infrastructure.

In all cases, the ACCC has made it clear that it considers efficient management of the supply chain as an important factor in any approval.

This is an example of an early approach by industry to the ACCC leading to an efficient solution to an ongoing supply chain problem.

Before 2004, excess demand for coal loading services at the Newcastle port resulted in large vessel queues forming offshore, at times numbering 70 ships.

The capacity of the coal chain has not matched the demand for coal loading services and the result is that Australian coal producers pay significant demurrage charges. The loss, in terms of demurrage, amounted to in excess of $400 million dollars per annum.

The ACCC has been involved, through the authorisations process, in the Hunter Valley since early 2004.

At that stage, the operator of the then only coal loader in Newcastle, Port Waratah Coal Services (PWCS), first sought authorisation for a queue management system, (the 'Capacity Balancing System') which was designed to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain.

While an interim authorisation was granted for this application in March 2004, an authorised Capacity Balancing System has essentially been in operation at the Port of Newcastle.

The ACCC always considered that these systems were in the public interest as transitional measures only.

The ACCC foreshadowed that infrastructure capacity expansions alone would not solve the problem in the Hunter Valley.

There were a number of underlying structural, regulatory and contractual issues in the coal chain that appeared to be contributing to the ongoing capacity imbalance.

Firstly, the common user provisions in the PWCS lease with the NSW Government had prevented it from signing long-term contracts.

Secondly, the various operators of the segments of the coal chain had been entering into contracts based on assessments of their own capacity without reference to the capacity of the coal chain as a whole.

As a result, contracts had been written for volumes of coal that the coal chain as a whole could not deliver and significant vessel queues formed offshore.

As the applicants, over several years, sought reauthorisation of various capacity balancing systems, the ACCC became increasingly concerned that the operation of these systems was reducing incentives for the industry to develop and implement long-term strategies to address the capacity constraints.

These concerns also arose at Queensland's Dalrymple Bay Coal Terminal – so much so that in early 2009 we proposed to deny authorisation of that terminal's capacity balancing system.

Our concern was that their proposal did not represent a long-term solution to the capacity constraints in the Goonyella coal chain.

The industry later withdrew the application.

Back in the Hunter Valley however, on 9 December last year, the ACCC granted authorisation to PWCS, Newcastle Port Corporation and the

Newcastle Coal Infrastructure Group (NCIG – new terminal at the Port, planned to begin operating later this year).

The authorisation approved the long-term Capacity Framework Arrangements at the Port of Newcastle until 31 December 2024. These arrangements:

- have allowed producers to sign long-term export contracts with PWCS for the first time which will underpin future investment decisions to expand capacity;

- established a framework which should assist producers to align their contracts with track and rail operators in the Hunter Valley; and

- supported centralised modelling of system capacity and monitoring of performance standards, which should prevent excessive vessel queues forming offshore in the new contracting environment.

The ACCC considered that the Capacity Framework Arrangements are likely to generate significant public benefits because they enable coal producers to sign long-term coal export contracts at the port, which establishes a commercial framework to support accurate and timely investment decisions in the Hunter Valley coal chain.

This will ensure that future capacity will be available as the demand for it arises.

Assessing access undertakings

Of course, the port terminals are only one part of the end-to-end supply chain in the Hunter Valley.

The ACCC is currently assessing the Australian Rail Track Corporation's (ARTC) proposed access undertaking under Part IIIA of the Trade Practices Act for the rail network in the Hunter Valley.

This forms a key component of the long term solution in the Hunter Valley.

In considering this undertaking, the ACCC is looking at the extent to which ARTC's arrangements work together with those at the port to ensure functioning contractual alignment across the entire coal chain.

In particular, on 10 February the ACCC issued a Position Paper on ARTC's access undertaking, setting out its preliminary views on matters other than price.

We've made our view clear that an efficient supply chain is in the national interest, and that any track access arrangements must provide for coordination of the supply chain from end-to-end.

Our view is that ARTC must include standard terms in all its contracts with coal producers that allow it and the Hunter Valley Coal Chain Coordinator to manage the track network efficiently, and that we won't allow ARTC and any individual coal producer to contract out of those terms.

That includes:

- requiring a coal producer who is exporting through the Newcastle ports to have network exit capacity at the ports before track capacity is allocated to it;
- the rules about how train paths are allocated;
- management of shortfalls in capacity;
- trading of capacity; and
- resumption of unused capacity that is being hoarded.

We expect ARTC to work closely with the Hunter Valley Coal Chain Co-ordinator on the use of these provisions.

Of course, the industry has to make the supply chain work.

The ACCC will be able to arbitrate if there is ever a dispute.

But the ACCC recognises, and seeks to promote, the role that the Hunter Valley Coal Chain Coordinator, coal producers, above-rail operators, port operators and ARTC itself play in the efficient functioning of the supply chain.

The ACCC aims to facilitate an acceptable outcome to support the necessary infrastructure.

A draft decision is imminent, and we are taking a close look at a range of factors in determining whether the undertaking, as submitted, balances the interests of the parties while providing pricing certainty needed for further investment to address blockages in the supply chain.

Grain

Next, the ACCC has had a role in parts of the supply chain in wheat export facilities.

Our role arose as a part of the removal of AWB's single-desk for the export of Australian wheat and the desire for competition to be introduced into wheat export and marketing.

However, there was a concern that, in liberalising the wheat export market, AWB's monopoly could be replaced by three "regional monopolies".

These were said to be the three grain port operators that own, respectively, the WA, SA and east coast grain terminals and who are also now accredited wheat exporters.

The concern was that the port terminal operators might discriminate in favour of their own wheat exporting arms– for example, in the allocation of shipping slots, or through discriminatory pricing.

Therefore, accompanying liberalisation of the wheat export markets was a requirement that the port terminal operators have arrangements for other wheat exporters to access their grain ports accepted by the ACCC.

The ACCC worked with the port terminal operators over the course of last year to develop suitable access arrangements.

During this process, the ACCC has been careful to find a balance which addresses the possibility of discriminatory conduct, but leaves the port terminal operators with sufficient operational flexibility to operate the supply chains efficiently.

The arrangements that were accepted by the ACCC have unlocked bottlenecks at grain ports. There are now 28 accredited wheat exporters, at least 15 of whom are currently active. This represents more competition and a greater choice for farmers when selling their wheat.

The ACCC has also allowed a notification from CBH in relation to Grain Express in WA to remain, recognising the public interest in an efficient supply chain for all grains in WA.

Containerised freight (Waterside)

Similarly, the ACCC is no stranger to the world of supply chains for containerised freight.

For many years now, the ACCC has consistently raised concerns about the lack of competition between the two stevedores (now owned by Asciano and DP World) and the reduced incentives for the duopoly to respond efficiently to the requirements of their users.

As you're well aware, container stevedoring is a vital part of our export and import supply chains through Australia's major container ports in Brisbane, Sydney and Melbourne.

These ports account for more than 80 per cent of national container traffic. Over the last decade, there has been strong growth in the demand for stevedoring services, but as the industry has remained a duopoly, opportunities for new entrants have been rare and unsuccessful.

Last financial year, the two incumbent stevedores achieved rates of return of nearly 18 per cent, more than the average return on assets for ASX200 companies (9 per cent).

Demand for stevedoring services, while flat in 2008-09, is expected to pick up as the domestic economy recovers from the global economic slowdown, and expected growth in container traffic over the next decade provides a good opportunity for Australian stevedoring to become more competitive.

Of course, the more competitive and productive our stevedores are, the more competitive Australian exports are on world markets, and the more resilient our economy is to global shocks.

In its 2006 paper, the Productivity Commission suggested productivity improvements of nearly 10 per cent were possible at Australia's container ports, a saving about $160 million in 2005-06 dollar terms.

I am pleased to say that the prospect of competition in each of the three major ports is real with changes ahead to break the decades-long duopoly. Indeed, allowing a third stevedoring company to compete could potentially slash millions of dollars of Australia's import and export costs.

At the Port of Brisbane, Hutchison Port Holdings has been appointed to operate two new container berths commencing in 2012.

In December last year, the NSW Government made its long awaited announcement in which it also appointed Hutchison to operate a third container terminal at Port Botany with operations due to commence around 2012.

For a while now, the spotlight has been on Australia's largest container port, Melbourne, to make a clear commitment about the role that competition can play in meeting Australia's future stevedoring needs.

The Victorian Government announced in August 2009 that it would 'test' the market for interest in an initial module of additional stevedoring capacity at Webb Dock ahead of 2017.

I note recent media reports that the Victorian Government is expected to make an announcement to bring forward plans to expand capacity at Melbourne's Webb Dock.

While some recent reports have been prepared to mention potential commencement dates for a third stevedore by the middle of this decade, the ACCC remains hopeful that at some point, sooner rather than later, increased competition will ultimately emerge in Melbourne with the associated benefits right through the supply chain.

State governments and port managers are to be congratulated for taking tough decisions not only in their state's best interests but considering the broader national interest.

A growing stevedoring market provides a unique opportunity for a new entrant to establish itself and through more competition, lift the performance of the whole industry.

I must note that the existing stevedores have been quoted as saying that they welcome competition – but not right now. This should be viewed with some well-honed scepticism.

Containerised freight (Landside)

While the prospect of more terminal operators and greater competition is good news for shipping lines and the Australian exporters and importers that rely on them, the New South Wales Independent Pricing and Regulatory Tribunal (IPART) observed that once containers are on the wharf each stevedore effectively becomes a monopoly.

This has the potential to create its own difficulties in the search for supply chain efficiency. A variety of approaches have been adopted to improve landside efficiency at Australia's major container terminals.

In some ports, such as Melbourne, some land-side supply chain efficiencies appear to have been achieved through a cooperative approach.

At other ports, such as Port Botany, cooperative approaches have not been as successful and the NSW Government has implemented a regulatory regime which can impose certain arrangements on supply chains.

I'd like to acknowledge efforts to get the parties together on road and rail land access booking and we've already had early discussions with them.

For example, Sydney Ports Corporation approached the ACCC at an early stage in response to the recommendations of the IPART report in late 2007, enabling useful exchanges and dialogue in relation to proposed initiatives to address truck access improvements at Port Botany.

We welcome the discussions we've had with both individual ports and with Ports Australia.

Airports

I can't leave you today without broaching the role of airports.

For high value products that must be moved quickly, express logistics and air freight services are critical.

Australia's major airports play a pivotal role in providing the infrastructure that supports express air freight.

The ACCC has a role in reporting each year on the performance of Australia's five major capital city airports.

While the emphasis of this analysis is on services for passenger transport, there are implications for the express freight sector whose cargo flies in the bellies of passenger planes – and whose freighters depend on the airports delivering runway and terminal capacity in a timely and efficient way.

There is a broad recognition that the major airports have market power.

I think the ACCC's views on what that has meant for services like airport car parking, for example, are well known. In light of ongoing price increases the ACCC maintains its view that airport car parking prices are consistent with charges reflecting an element of monopoly rent.

Although a number of alternatives to onsite airport car parking have been observed by the ACCC, the airports are in a position to set car parking prices above an efficient level by controlling the conditions of landside access to terminal facilities.

But in relation to freight carried on passenger planes at Sydney Airport, domestic airside services have been declared and the ACCC is able to arbitrate disputes.

At other airports, while their prices are not subject to regulation, the Government continues to scrutinise the airports' performance and expects the airports to price, invest and operate efficiently.

It is therefore incumbent upon the airports to deal with their users, including their freight and logistics customers, in a fair and reasonable way.

Failure to do so carries the threat of declaration/arbitration.

Conclusion

The significance of the efficiency of Australia's transport supply chains for exports and economic growth and prosperity cannot be understated.

The ACCC's fundamental concern is the interests of a vigorous but fair marketplace which is in the best interests of consumers and the logistics industry.

Innovative solutions to transport supply chain bottlenecks will invariably involve some coordination and cooperation between industry players and this is not itself a problem if such negotiations are done with the Trade Practices Act in mind.

I would encourage you to seek the advice of an experienced trade practices solicitor and then come and talk to the ACCC very early in the process.

Indeed, far from preventing efficient outcomes, the ACCC has itself taken steps against blockages in supply chains – just look at our work with stevedoring.

Once again, I'd like to commend the Australian Logistics Council and the various industry peak bodies – for example, Ports Australia – for their ongoing efforts to identify practical approaches to logistics and supply chain management improvement issues.

Your role in educating and encouraging industry participants to bring about long-term productivity enhancements must be acknowledged.

Finally, let me suggest to you that competition law, far from putting the brakes on solutions, can in fact help oil the wheels to get vital transport chains working well.

Thank you.